No. 169.

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In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE UNITED STATES, APPELLANT,
v.
JOSE ISABEL MARTINEZ ET AL. } No. 169.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

BRIEF ON BEHALF OF THE UNITED STATES.

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STATEMENT.

The validity of the grant involved in this case is not now for consideration or determination. The sole question pertinent to this appeal relates to the propriety of the Court of Private Land Claims in rendering a money judgment under the circumstances against the United States in favor of the claimants for certain lands, at the rate of $1.25 per acre, *included* within the boundaries of the grant as confirmed by the Court of Private Land Claims in the original proceeding, but which were subsequently found to have been previously sold and patented by the United States to various parties under its homestead laws.

There is involved the construction of three provisions of the act of Congress, approved March 3, 1891

(26 Stat. L., p. 854), creating and limiting the jurisdiction of the Court of Private Land Claims, which are as follows:

> The petition shall set forth fully the nature of their claims to the lands, * * * the name or names of any person or persons in possession of or claiming the same, or any part thereof, otherwise than by the lease or permission of the petitioner; * * * and a copy of such petition, with a citation to any adverse possessor or claimant, shall, immediately after the filing of the same, be served on such possessor or claimant in the ordinary legal manner of serving such process in the proper State or Territory, etc. (Sec. 6.)
>
> If in any such case a title so claimed to be perfect shall be established and confirmed, such confirmation shall be for *so much land only* as such perfect title shall be found to cover, *always excepting any part of such land that shall have been disposed by the United States*," etc (Sec. 8.)
>
> SEC. 14. That if in any case it shall appear that the lands or any part thereof decreed to any claimant under the provisions of this act shall have been sold or granted by the United States to any other person, such title from the United States to such other person shall remain valid, notwithstanding such decree, and upon proof being made to the satisfaction of said court of such sale or grant, and the value of the lands so sold or granted, such court shall render judgment in favor of such claimant against the United States for the reasonable value of said lands so sold or granted, exclusive of better-

ments, not exceeding one dollar and twenty-five cents per acre for such lands; and such judgment when found, shall be a charge on the Treasury of the United States.

This claim for $2,320.91 as compensation for 1,856.73 acres of land lying within the limits of the Juan Jose Lobato grant, which had been disposed of and patented by the United States, grows out of the confirmation of that grant by the Court of Private Land Claims, and a résumé of the proceedings leading up to its confirmation and subsequent survey and patent is necessary.

On February 28, 1893, the present appellees, with the exception of George Hill Howard, claiming to be the heirs at law and legal representatives of Juan Jose Lobato, filed their petition (R., 21–22) in the Court of Private Land Claims for the confirmation of the grant which they alleged had been made to Juan Jose Lobato on August 24, 1740, juridical possession given, and the grant ratified and confirmed by the proper authorities on June 15, 1744. They also alleged that the same tract had been previously granted to Cristoval Torres, but that his grant had been revoked in 1733 and the tract declared to be crown lands; that from the date of the grant to Lobato in 1740 and for a period of one hundred and fifty-three years (down to the time of the filing of the petition), he and his legal representative had been in the *peaceable adverse possession* of the same.

Proceedings before the surveyor-general of New Mexico in 1884, not now material, are set out in the

petition, which also contains other allegations of no relevancy now.

There is, however, one paragraph of this petition which becomes quite pertinent now, to wit, paragraph 11, which is as follows:

> That there are no adverse holders, possessors, or claimants of or to any portion of said tract, and that the same does not conflict in whole or in part with any claim derived from the Spanish or Mexican Government. (R., 22.)

Subsequently, on October 16, 1893, a supplemental petition (R., 25, 26) by the same claimants was filed, which recited the filing of their original petition, and that Juan Torres and Jesus Torres, as the legal representatives of Cristoval Torres, had filed a petition before the Court of Private Land Claims, praying a confirmation of the grant made to Cristoval Torres on June 9, 1724 (heretofore mentioned), which said grant was in conflict with the grant to Lobato; that the grant to Torres in 1724 had been forfeited (which view the court also adopted), and reasserted the making of a grant of the same lands to Juan Jose Lobato in 1740, and the proceedings in relation to it.

It further generally reaffirmed all the allegations and statements contained in the original petition and denied each and every allegation, averment, and statement in the petition of the Torreses which was in conflict with the original petition, renewed the prayer of their original petition, and asked that the two Torreses be made parties to this proceeding.

The answer of the United States (R., 26, 27) was filed on November 20, 1893, and in a general way asserted its ignorance of a grant of a tract of land to the predecessors in interest of the plaintiffs, as to their succession in interest to the original grantee, as to the grant to Juan Jose Lobato in 1740, and the giving of juridical possession as claimed; but it said that if such possession had been given, continuous and undisputed possession had not been maintained, and in other ways denied the validity of the grant and asked for its rejection.

The case proceeded to trial, and on the trial the Government introduced in evidence the title papers of three other grants, to wit, the Plaza Colorado (R., 57–65), Plaza Blanca (R., 66, 67), and town of Abiquiu (R., 67, 78), which showed them to be in conflict with the Juan Jose Lobato grant.

On December 4, 1893, the court entered its decree (R., 79, 80) confirming the grant as a complete and perfect one to the heirs, assigns, and legal representatives of Juan Jose Lobato, adopting the boundaries as alleged in the petition and sustaining its material allegations, except that to the effect that the original grantee and his successors in interest had been in the actual use and occupation of that portion of the grant which was included within the exterior limits of the Plaza Colorado, Plaza Blanca, and town of Abiquiu grants, and these portions were excluded from the operation of the decree. In all other respects the material allegations of the petition were substantially conformed to in the

decree, and that portion of the grant included within these three other grants was the only part of the Juan Jose Lobato grant, as claimed by the petitioners, which was not confirmed to them.

Then the grant went to survey, and on October 19, 1895 (R., 80, 81), the court entered its order approving the survey in accordance with its previous decree of confirmations, and directed that patent issue for the tract therein confirmed, which has since issued to the confirmees.

Subsequently (R., 81, 82) the original decree of confirmation was amended to the extent that a paragraph was inserted therein excepting from its operation any mineral rights to gold, silver, or quicksilver, as provided by the creative act of March 3, 1891.

Nowhere in all these proceedings did the plaintiffs mention the fact, nor was it shown by anyone, that any portion of the lands ultimately confirmed by the court, the boundaries of and exclusions from which were specifically stated in the decree, had been heretofore disposed of and patented by the United States to other persons. The first intimation of such a condition comes seven years after the entry of the final decree of confirmation, and five years after the order approving the survey and directing the issue of the patent, and, notwithstanding their own allegations in paragraph 11 of the petition, to the effect "*that there are no adverse holders, possessors, or claimants of or to any portion of said tract*," and in the face of the condition precedent to a confirmation imposed by section 6 of the act creating the

court and giving claimants, under the terms and conditions and absolute restrictions of the act, the opportunity to sue the United States, which section required that every "petition shall set forth fully * * * the name or names of any person or persons in possession of or claiming the same (lands), or any part thereof, otherwise than by the lease or permission of the petitioner * * * and a copy of such petition, with a citation to any adverse possessor or claimant, shall, immediately after the filing of the same, be served on such possessor or claimant in the ordinary legal manner of serving such process in the proper State or Territory," etc.

On April 23, 1900, the claimants in the original proceeding for the confirmation of the grant, and G. Hill Howard, claiming an interest therein by virtue of a conveyance from the original petitioners since the date of the decree of confirmation, filed their petition in the Court of Private Land Claims, the material allegations of which are briefly as follows (R., 1, 2):

That the Court of Private Land Claims on December 4, 1893, confirmed unto Jose Ysabel Martinez and his copetitioners (the appellees with the exception of Howard) the Juan Jose Lobato grant as a complete, perfect, and subsistent grant; and that afterwards an official survey of the same was made and approved by the court.

That certain parcels of land included therein, designated in Exhibit A, filed therewith (R., 4, 5), aggregating 2,056 acres, were so disposed of, granted, and patented by the United States and to the persons as

in said exhibit set forth; that the value of the same is over $1.25 per acre, they being the most valuable parts of the said grant, for the reason that they contain flowing waters for irrigation and springs for the watering of stock, and that the whole thereof is worth more than $1.25 per acre for stock purposes alone.

The petition closes with a prayer that the court may render judgment against the United States in favor of the petitioners for the value of the lands so patented, the same to be a charge upon the Treasury of the United States, one half in favor of George Hill Howard and the other half in favor of Jose Isabel Martinez for himself and in trust for his said coconfirmees of the said grant, or in favor of said Howard directly, or in his favor for himself and in trust for the said Jose Isabel Martinez and in trust for him and his said coconfirmees, their heirs and assigns.

On April 26, 1900, the United States filed its answer (R., 6, 7), which admitted the confirmation of the Juan Jose Lobato grant, but asserted that it was confirmed to Juan Jose Lobato, his heirs, assigns, and legal representatives, and that the decree so stated; it also admitted the survey and approval of the same by the court, but asserted that it was in due time transmitted to the Commissioner of the General Land Office, as provided by law, and was not within the control or jurisdiction of the court.

It alleged ignorance as to the conveyance of an interest in the grant to Howard and as to the disposition of the lands claimed to have been disposed of and patented by the United States.

It did assert, however, that the petition of the claimants in the original proceeding for the confirmation of the grant contained the allegation, "that there are no adverse holders, possessors, or claimants of or to any portion of said tract, and that the same does not conflict in whole or in part with any claim derived from the Spanish or Mexican Government."

> And further, that said plaintiffs in said suit failed and neglected to make holders of said alleged claims and patents parties defendant to said suit, as required by law, but proceeded to try said cause, obtained a decree of confirmation against the United States, which has long since become final, and upon which said final decree the official survey, as provided by law, has been made, completed, and approved by that court upon the application and at the instance of the plaintiffs in said original cause and the said George Hill Howard, their attorney of record; and that said George Hill Howard was at and during all times the attorney of record for and on behalf of the plaintiffs in said cause, and had the management and control of the same, and still has, and was presumedly conversant with all the forms of procedure and proceedings and requirements of law in the premises. That by reason of the failure of said original plaintiffs and of their attorney, George Hill Howard, to make all adverse claimants and holders of patents, as alleged in this petition, parties defendant; and by reason of the allegations and disclaimer contained in the original petition, in paragraph 11, aforesaid, they thereby waived and disclaimed all right, if any they

had, to challenge any disposition theretofore made under the laws of the United States to (of) any portion of said grant.

Further answering, the defendant, the United States, says the petitioners ought not to have or maintain their said petition, for that no claim was made in said original suit for any wrongful disposition made by the United States, if any, of any portion thereof, under the public land laws, and therefore abandoned the same and permitted and induced a confirmation (of the same) without regard to any such wrongful disposition by the United States, and prosecuted the same to final judgment, approval of the official survey, and the certification thereof to the Commissioner of the General Land Office for patent, which said patent is ready to be issued and delivered upon the payment of one half of the costs and charges incurred in that behalf, as provided by law.

Wherefore, the defendant prayed the petitioners should not have or maintain their petition and that the same should be denied and dismissed. (R., 7.)

On April 26, 1900, the plaintiffs filed a general demurrer (R., 9) to the Government's answer, accompanied by an affidavit of George Hill Howard (R., 8), which was to the effect that he had been at all times the solicitor of the plaintiffs and that they and he, until after the survey of said grant, did not and could not know or certainly allege and affirm that the lands granted and disposed of by the United States as set forth and shown in their petition were within the

exterior limits of their said grant, and consequently no allegation in relation thereto was made in their original petition; that such knowledge only came to the deponent within the last two years, and contained other matter of no significance now.

On May 10, 1900, the court sustained the plaintiffs' demurrer to the answer of the United States (R., 10); whereupon the court proceeded to consider the petition upon an agreed statement of facts (R., 10–12), which was substantially that the United States had disposed of lands aggregating 1,856.73 acres within the limits of the Juan Jose Lobato grant as the same was finally confirmed by the court, specifying the portions so disposed of, and that the said grant was finally approved and confirmed by the Court of Private Land Claims as a valid, perfect, and subsistent grant on December 4, 1893; that the value of said lands so disposed of was $1.25 per acre; that none of the patentees and adverse possessors thereof were parties to the original suit for confirmation of the grant, nor served with copy of the petition and citation, nor were present in court; that the entire proceedings and record in the original cause are a part of the record in this proceeding.

On May 11, 1900, the court decided the matter against the United States, and rendered a judgment against it for $2,320.91 in accordance with the prayer of the petition. The decree and majority (three) opinion of the court are found on pages 12 to 16 of the record. The dissenting opinion of Mr. Justice

Sluss, sustaining the Government's contentions, which is concurred in by Mr. Justice Murray, is found on pages 16 to 18 of the record.

ARGUMENT.

The original proceedings out of which the present claim for indemnity grew, was a suit by the present appellees, except Howard, against the United States in the Court of Private Land Claims under the provisions of the act of March 3, 1891 (26 Stat. L., p. 854), for the confirmation of the Juan Jose Lobato land grant, resulting in a decree in favor of the claimants (appellees), confirming the same and finding the title complete and perfect at the date of the cession by the treaty of Guadalupe Hidalgo (1848) (R., 79, 80). From this decree no appeal was prosecuted, and, becoming final, it was executed by survey, approval, and the land patented to the confirmees.

It now appears that portions of the land included within the limits of this grant, as confirmed, had been patented to other persons under the homestead laws of the United States, and the confirmees are seeking to recover the indemnity provided in the fourteenth section of the private land claim act. The question most pertinently suggested is, Have they brought themselves within the requirements of the act entitling them to demand and receive indemnity?

The appellees have received a patent to the identical land which the United States had prior to their suit conveyed by patent under the homestead laws to others, and two patents upon the same land are now

outstanding. The Juan Jose Lobato grant was held by complete and perfect title at the date of the cession and was asserted and confirmed under the provisions of the eighth section of the act. This title did not need the aid of the United States to be evidenced by a patent upon a decree of confirmation by the Court of Private Land Claims. However, the holders of perfect titles were given permission *upon terms*, to take a confirmation and patent by applying to the court. They were also at liberty, without sacrifice or prejudice to their title, to decline the forum. (*Ainsa* v. *New Mexico and Arizona R. R.*, 175 U. S., 76, 90).

Imperfect titles needing the aid and recognition of the Government were required to apply to the court within two years from the taking effect of the act (March 3, 1891), or have the bar of the statute erected against them (section 12). With this character of title we are not concerned in this proceeding.

By permitting the United States to be sued, it was perfectly competent for Congress to prescribe the procedure and name the terms and conditions upon which decrees might be entered against the United States, and, as well, define the legal effect of the same. If such jurisdiction was availed of by claimants under perfect titles, they thereby consented to have the conditions imposed upon them, however onerous.

Claimants, upon applying to the court under section 8 of the act, were required to conform to all the provisions of the act and were subject to the same restric-

tions as to procedure as in all other cases. The first paragraph of that section provides:

> That any person or corporation claiming lands in any of the States or Territories mentioned in this act under a title derived from the Spanish or Mexican Government that was complete and perfect at the date when the United States acquired sovereignty therein, shall have the right (but shall not be bound) to apply to said court in the manner in this act provided for other cases of confirmation of such title; and on such application said court shall proceed to hear, try, and determine the validity of the same and the right of the claimant thereto, its extent, location, and boundaries, in the same manner and with the same powers as in other cases in this act mentioned.

Referring to section 6, it is provided that in addition to suing the United States, the claimants shall be required to sue also "any person or persons in possession of or claiming the same or any part thereof otherwise than by lease or permission of the petitioner," and to that end it is required that "a copy of such petition, with a citation to any adverse possessors or claimants, shall, immediately after the filing of the same, be served on such possessor or claimant in the ordinary legal manner of serving such process in the proper State or Territory, and in like manner on the attorney for the United States," and such adverse claimants and the United States shall plead, answer, or demur, in default of which the court shall proceed to hear the cause on the petition and proofs presented, but no decree

shall be rendered except upon full legal proof and hearing.

These provisions apply to all claims filed before the court, whether perfect or imperfect. They are specific and mandatory provisions and have been so construed by the Court of Private Land Claims in many cases until now.

The eighth section further provides, as a condition upon which claimants under perfect titles will be given a decree:

> If in any such case, a title so claimed to be perfect shall be established and confirmed, such confirmation shall be for so much land *only* as such perfect title shall be found to cover, always excepting any part of such land that shall have been disposed of by the United States (and always subject to and not to affect any conflicting private interests, rights, or claims held or claimed adversely to any such claim or title, or adversely to the holder of any such claim or title). And no confirmation of claims or titles in this section mentioned shall have any effect other or further than as a release of all claim of title by the United States; and no private right of any person, as between himself and other claimants or persons, in respect of any such lands, shall be in any manner affected thereby.

It now appears that claimants have not submitted to these requirements, but by their own acts and allegations have induced a confirmation and patent without mention of the existence of these adverse patents, and

without having made the vendees of the United States parties to their proceedings, as required in all cases prosecuted under the act; but they have induced a confirmation and patent of their grant without excepting the very lands for which a money judgment by way of indemnity is now asked.

It would have been improper to award judgment for indemnity in the original decree without first bringing in by process the vendees of the United States and requiring them to produce their titles, so that the court might ascertain their boundaries, quantity, and value, and decree as is provided by the eighth and fourteenth sections.

United States v. *Moore*, 12 How., 209.
United States v. *Castaut*, Ibid., 437.
United States v. *Davenport*, 15 How., 1, 8.
United States v. *Roselius*, Ibid., 30.

Whether the claimants' patent is better than that of the homesteaders is not an issue here; the question is, are they entitled to a money judgment against the United States under the fourteenth section of the act. They made no claim for it in their original suit nor at any time prior to the final approval of the survey by the court; they did not state what lands the United States had disposed of to others within the grant, nor who were the vendees; neither did they make them parties. (*United States* v. *Roselius*, *supra*.)

The power to award an indemnity is an incident to the case where jurisdiction exists to decree that the lands claimed were held by perfect title, and except

therefrom such portions as had been disposed of by the United States and direct that patent shall issue for that portion only which is not covered by the excepted lands, and then direct inquiry as to the value of such excepted lands in order that judgment may be entered under the provisions of section 14. The right to maintain the claim for indemnity must arise upon the record and "the facts on which relief is to be had under that section (14) must be made to appear as a part of the case and before the court has ceased to have jurisdiction over the land which is the subject of the case." (Dissenting opinion of Mr. Justice Sluss, R., 16.)

The case at bar stands as a claim made for indemnity after the court has awarded them all they demanded and which they have sanctioned by accepting the confirmation and survey and patent. The jurisdiction was foreclosed when claimants induced the decree and accepted the survey and certification to the Commissioner of the General Land Office for issuance of patent. The claim should have been made in the original petition. (*Real de Dolores del Oro* v. *United States*, 175 U. S., 71, 75.)

The indemnity provided in section 14 of the act of 1891 is in pari materia with the eleventh section of the act of May 26, 1824 (4 Stats., p. 52), which is as follows:

> SEC. 11. That if in any case it should so happen that the lands, tenements, or hereditaments decreed to claimant under the provisions of this act shall have been sold by the

> United States or otherwise disposed of, or if the same shall not have been heretofore located, in each and every such case it shall and may be lawful for the party interested to enter, after the same shall have been offered at public sale, the like quantity of land, in parcels, conformable to sectional divisions and subdivisions, in any land office in the State of Missouri; and if it should so happen that in making such entries there should remain in the hands of the enterer a fractional excess of acres of less number than the smallest sectional divisions authorized by law to be sold, it shall and may be lawful for the party interested to enter, in virtue of such fractional excess, the quantity of one-half quarter section upon paying one dollar and twenty-five cents for each acre contained in such half quarter section over and above the fractional excess to which he may be entitled by such confirmation.

That section of the act of 1824 and the proper procedure to obtain the indemnity have received the repeated consideration of this court in the following cases:

> *United States* v. *Moore*, 12 How., 209, 223.
> *United States* v. *Costant*, ibid., 437.
> *United States* v. *Roselius*, 15 How., 30, 33–35.
> *United States* v. *Davenport*, 15 How., 1, 8–9.

The whole theory of indemnity under private land claim acts is that neither land scrip nor money indemnity could properly be decreed except where the vendees of the Government were made parties. It was said in the Moore case:

> The purpose of Congress was, first, to authorize a suit against the United States, and, in the next place, to give judicial cognizance of a description of incipient claims having no standing in a court of justice before the act (1824) was passed; and thirdly, that the petitioner should be bound to sue private persons claiming the same land, so that those having an interest and a better knowledge of facts and more capacity to defend than the United States might be drawn into the contest; and that they should be compelled to produce their titles, so that if a decree was made for complainant the court could ascertain what part of the land should be granted to him by patent; and as this could only be done by specific ascertainment of interfering claims, the decree must of necessity specify their boundaries and quantity. Nor can it stop here; it must adjudge that a warrant shall issue and be the subject of location. (12 How., 223.)

Although the act of 1824 applied only to imperfect grants, still the analogy between it and that of 1891 is so close, and standing in pari materia, the procedure provided seems to be identical as to all adverse possessors and claimants, especially the vendees of the United States, that the cases cited are forcibly in point.

When claimants entered the Court of Private Land Claims they were compelled to proceed in the same manner as claimants under imperfect titles and were no better circumstanced. They agreed to the impositions of the burdens of the act in order to secure a patent,

upon a decree of confirmation, and accept in lieu thereof the indemnity provided by section 14; but it was incumbent upon them to make claim at the proper time for it and bring in all adverse possessors and claimants, especially the vendees of the United States, whose titles to the United States were under obligations to protect against any further encroachments by the action of any department or tribunal presuming to act upon the same by delegation from the political branch of the Government.

It is respectfully submitted the judgment should be reversed and the application or petition dismissed.

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MATTHEW G. REYNOLDS,
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